

**IN THE**  
**Supreme Court of the United States**

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**OCTOBER TERM, 1947**

---

**No. 373**

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**ROY COLE and LOUIS JONES, *Petitioners***

**v.**

**STATE OF ARKANSAS, *Respondent***

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF ARKANSAS**

---

**BRIEF FOR PETITIONERS**


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**OPINIONS. BELOW**

No opinion was filed by the Pulaski Circuit Court (First Division), the trial court. The opinion of the Supreme Court of Arkansas has not yet been officially reported, but appears in 202 S.W. (2d) 770, and in the Record at 105-108.

**JURISDICTION**

The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code, as amended, 28 U.S.C. 344(b). The petition for a writ of certiorari was granted on December 8, 1947.

**STATUTE INVOLVED**

Act 193 of the Arkansas Acts of 1943 appears in the Appendix to this brief.

## STATEMENT OF THE CASE

Cole and Jones, the petitioners, together with Jessie Bean, were originally indicted by an Arkansas grand jury for using "force and violence" to "prevent Otha Williams from engaging in work as a laborer of the Southern Cotton Oil Company" (R. 6). The indictment thus alleged a violation of Section 1 of Act 193 of the 1943 Arkansas Acts (quoted in the Appendix of this brief). The three defendants were convicted, but on appeal the Supreme Court of Arkansas reversed and remanded for a new trial. *Cole et al. v. State*, 196 S.W. (2d) 582.

Following the reversal, the prosecuting attorney filed the felony information involved in this proceeding. This information charged as follows:

On the 26th day of December, A. D. 1945, in Pulaski County, Arkansas, Walter Ted Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a labor dispute existed, and by force and violence prevented Otha Williams from engaging in a lawful vocation. The said Roy Cole, Louis Jones and Jessie Bean, in the County and State aforesaid, on the 26th day of December, 1945, did unlawfully and feloniously, acting in concert with each other, promote, encourage and aid such unlawful assemblage, against the peace and dignity of the State of Arkansas. (R. 1.)

The information thus charged Cole, Jones and Bean with violating one of the clauses of section 2 of the Act (see Appendix), that concerning aiding an unlawful assemblage. It did not repeat the charge of the indictment that they by force and violence prevented Otha Williams from working; on the contrary, this conduct was attributed to Walter Ted Campbell, not a defendant.

The Pulaski Circuit Court (First Division) then on its own motion quashed the indictment which had been the basis for the first trial (R. 2).

All three defendants were convicted on trial of the information (R. 5, 103), and they were each sentenced to serve a year in the State Penitentiary (R. 10, 11, 12).

On appeal, the Supreme Court of Arkansas, with one Justice dissenting, affirmed the convictions of Cole and Jones, the

petitioners. The conviction of Bean was reversed with directions that the case be dismissed as to him (two Justices dissenting), on the ground that the evidence was not sufficient to sustain his conviction (R. 104-108).

In its opinion the Supreme Court of Arkansas asserted, manifestly erroneously, that the information accused the petitioners of using force and violence to prevent Otha Williams from working, in violation of section 1 of the Act (R. 107). It thus avoided the constitutional objections raised to the application of the statutory provision for violation of which the petitioners had actually been informed against (R. 107).

A petition for rehearing (R. 108, 109) was summarily denied by the court on June 30, 1947 (R. 109).

At the trial, the following facts appeared:

The petitioners are two Negroes, who were employed by the Southern Cotton Oil Company in North Little Rock, Arkansas. On December 17, 1945, about 112 of the plant's workers, including the petitioners, went out on strike for higher wages and shorter hours; five workers remained in the plant (R. 14-16, 70, 71, 85). On December 26, 1945, the five non-striking workers left the plant in a group at the close of work. Near the plant and across the railroad track was a group of about four of the strikers. The testimony differs as to their identity and number, but some of the State's testimony placed Cole and Jones in the group. One of the strikers, identified by the State's witnesses over his denial as Louis Jones, called to Otha Williams, one of the non-strikers, and asked him to wait. Williams refused. Walter Ted Campbell, a striker, then attacked Williams. The two men fought, and Williams used a pocket knife and killed Campbell (R. 19-22, 24, 25, 28, 29, 34-36, 42-45, 76). The record is clear that no one other than Campbell attacked, fought or hit Williams (R. 37, 38, 45, 54, 55), nor does the record show any violence

<sup>1</sup> The record designates Negro witnesses by the symbol "(CM)". See *e. g.*, R. 70 (Jones), 77 (Cole). The same symbol is used in the information (R. 1).

or physical conflict other than that between Williams and Campbell.<sup>2</sup>

At the trial the court instructed the jury:

If you believe from the evidence in this case beyond a reasonable doubt that on or about the 26th day of December, 1945, Walter Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a "labor dispute" existed and by force and violence prevented Otha Williams from engaging in a lawful vocation; and if you further believe beyond a reasonable doubt that the defendants wilfully, unlawfully and feloniously, while acting in concert with each other, promoted, encouraged and aided such unlawful assemblage, you will convict the defendants as charged in the indictment. (R. 95.)

The court also instructed the jury that "it is perfectly lawful for laborers to peacefully picket their place of employment and to try to persuade by peaceful means other employees to join them". (R. 102), and that the mere fact that defendants were present at the time of the Campbell-Williams altercation would not justify a verdict of guilty (R. 101). However, the court did not instruct the jury that guilt could be found only if the defendants participated in or encouraged or aided any violence, whether committed by Campbell or anyone else.

### **SPECIFICATION OF ERRORS TO BE URGED**

1. The court below erred in affirming the convictions of the petitioners since the clause of section 2, Act 193, Arkansas Acts of 1943, under which petitioners were convicted, and their convictions thereunder, violate the Fourteenth Amendment by depriving petitioners of freedom of speech and assembly and by imputing to them the guilt of another.

2. The court below erred in affirming the convictions since

<sup>2</sup> Willie Brown, one of the five workers, testified that after Williams refused to stop, Louis Jones gave a signal and said, "Come on, boys," after which "they flew up like blackbirds and came fighting" (R. 21). However, no testimony is in the record of any blow struck other than in the Campbell-Williams fight, and Brown left the scene unmolested and on Cole's suggestion, after seeing Campbell strike Williams (R. 21, 22, 79). Willie Johnson and Elvie Washington, two of the five workers, ran away (R. 31, 32, 36); and the movements of the fifth worker (Lawrence Cross), who did not testify, are not in the record.

the statute is so vague and indefinite as not to supply an ascertainable standard of guilt, and thus denies the petitioners due process of law, in violation of the Fourteenth Amendment.

3. The court below erred in affirming the convictions under a statute for violation of which the petitioners had not been charged; the court below thus denied petitioners due process of law and the equal protection of the laws in violation of the Fourteenth Amendment.

4. The court below erred in affirming the convictions since Act 193 violates the due process and equal protection of laws provisions of the Fourteenth Amendment by making certain acts, which otherwise are misdemeanors, felonious merely because they are committed in aid of striking workmen.

### ARGUMENT

- I. The statute and the convictions thereunder violate the Fourteenth Amendment by prohibiting free speech and assembly and by imputing guilt for another's acts.

Section 2 of Act 193, Arkansas Acts of 1943, defines two crimes. First, it is a felony for a person, acting in concert with others, to assemble near a place where a labor dispute exists and to use force or violence to prevent any person from engaging in a lawful vocation. Second, it is a felony for any person to promote, encourage or aid "any such unlawful assemblage." The petitioners were informed against and convicted on trial only of the second of these two offenses. (See information, R. 1.)

The second offense presupposes that the first characterizes a certain type of assemblage as "unlawful." This is not, of course, the case; the first part of the statute makes unlawful not any assembling *per se* but rather assembling followed by the act of using force and violence to prevent a person from working.

There are, therefore, at least two possible meanings which can be ascribed to the second offense within the statutory context. (1) Under the most literal reading of the statute, the second offense consists simply of promoting, encouraging or aiding an assemblage at or near a place where a labor dispute

exists. (2) With a small sacrifice of literalness, the second offense may be taken to consist of encouraging or aiding such an assemblage if thereafter any member of the assembly (who, as here, need not be the person charged with the offense) uses force or violence to prevent someone from working.

Whichever of these two meanings is assigned, the statute clearly violates the Fourteenth Amendment. That Amendment protects freedom of speech and of assembly from infringement by the States. *Near v. Minnesota ex rel. Olson*, 283 U. S. 697; *Stromberg v. California*, 283 U. S. 359; *DeJonge v. Oregon*, 299 U. S. 353; *Thomas v. Collins*, 323 U. S. 516; *Hague v. C. I. O.*, 307 U. S. 496. Striking laborers have a constitutional right to assemble peaceably near the plant which is struck and to express their views on the matter in controversy. Legislation which denies them that right is invalid. *Carlson v. California*, 310 U. S. 106; *Thornhill v. Alabama*, 310 U. S. 88; *AFL v. Swing*, 312 U. S. 312.

The statutory clause here involved, if assigned the first of the two suggested meanings, prohibits the simple act of encouraging an assembly in the neighborhood of a struck plant. The interdicted act is itself an exercise of speech and of assembling. The rights to speak and to assemble would be illusory if there did not also exist the rights to arrange to speak and to assemble. The First and Fourteenth Amendments cannot be taken to protect merely spontaneous speech or accidental assembly. It is obvious that the picketing assemblies held, in the cases cited above, to be beyond the state's prohibitory powers, were prearranged.

By the same token, the statute is invalid if it be given the second of the two meanings mentioned above—namely, that encouraging the assembly becomes felonious on the occurrence of the condition subsequent that any member of the assembly resorts to violence. If the State may not directly prohibit the encouragement of the assembly, it clearly may not prohibit it, indirectly but no less effectively, by attaching to it highly penal consequences upon the occurrence of action neither participated in nor encouraged by the persons who encouraged the assembly, beyond their control, and not necessarily an outgrowth of the assembly. The liberties guaranteed by the

First and Fourteenth Amendments cannot, we submit, be denied by such indirection or circumvention. *Cf. Bailey v. Alabama*, 219 U. S. 219; *Grosjean v. American Press Co.*, 297 U. S. 233; *Murdock v. Pennsylvania*, 319 U. S. 105.

Furthermore, the imputing of criminal liability to one person for the independent acts of another is itself a deprivation of due process. "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application." *Kotteakos v. United States*, 328 U. S. 750, 772. *Cf. Bridges v. Wixon*, 326 U. S. 135; *DeJonge v. Oregon*, *supra*; *Schneiderman v. U. S.*, 320 U. S. 118, 136.

Nor is there any possibility of saving the statute, at least as here applied, by a construction limiting the felony to the encouragement or persuasion of an assembly formed for the purpose of engaging in violence. *Cf. Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*, 315 U. S. 437. No such construction was given to the jury. The jury therefore, could have found guilt consistent with the instructions merely by finding that the defendants had encouraged the assembly, even though they had not participated in, encouraged, contemplated, or anticipated the occurrence of violence. Indeed, it convicted Bean in the same trial, and as to him the Arkansas Supreme Court itself recognized (R. 107) that the most the evidence showed was that he had been seen near the scene of the altercation. It is apparent that a statute which is invalid if taken at face value cannot be saved by a construction not submitted to the jury. *Bailey v. Alabama*, *supra*. *Cf. Screws v. U. S.*, 325 U. S. 91.

On the contrary, the statute must be regarded as having been literally applied or, more likely, as having been applied with the construction most malign to the defense which is reasonably derivable from its text. This is particularly true because a saving construction of the statute would necessarily be a torturing of the text. Since section 1 of the statute amply covers the use or attempted use of force or threats, section 2 must be taken as being aimed at the act of assembling under either of the two possible constructions.

It is true that the trial court charged that peaceful picketing was lawful. In the statutory context, this charge was hardly sufficient to remove picketing from the statute's application since it did not negate guilt arising as a result of violence committed on the picket line by some other person. But even if the charge be construed to eliminate picketing from the statute's ambit, it still did not remove other assemblies which enjoy the same constitutional immunity. Since the court did not instruct the jury that guilt could be found only if the defendants had encouraged or participated in violence, it is apparent that the statute could have been applied, consistent with the instructions, to punish an assembly which, though peaceful, lawful, and constitutionally protected, was not engaged in picketing. The prosecution's case, in fact, showed that the assemblage here involved was not picketing, as that activity is commonly understood.

## **II. The statute is in conflict with the Fourteenth Amendment because of its vagueness.**

The due process clause invalidates a criminal statute which is so obscure that persons subject thereto may not reasonably understand the actions proscribed. *Lanzetta v. New Jersey*, 306 U. S. 451; *M. Kraus & Bros. v. U. S.*, 327 U. S. 614; *Connelly v. General Construction Co.*, 269 U. S. 385. This rule is especially exacting where the statute impinges on the liberties of expression protected by the First Amendment and the Fourteenth Amendment. *Cf. Herndon v. Lowry*, 301 U. S. 242.

The statute under consideration is clearly invalid under these tests. We have already seen the confusion arising from the reference to "such unlawful assemblage" when no assemblage is in fact so characterized. The ambiguity so arising in itself prevents the statute from establishing a reasonably ascertainable standard of guilt, particularly since freedom of speech and assembly are so intimately concerned.

As indicated above, the statute was not so construed at trial as to prevent an unconstitutional infringement of the rights of assembly and speech. But even if it had been given such a construction, the interpretation would have necessarily

been a highly strained version of the text; hence the statute would then have been invalid on the grounds that it could not be fairly understood "in advance of judicial utterance." *Lanzetta v. New Jersey*, *supra*, at 456. See also *Connally v. General Construction Co.*, *supra*, at 394; *Pierce v. U. S.*, 314 U. S. 306.

The statute possesses still other fatal elements of vagueness. It refers to an assemblage "at or near any place where a labor dispute exists." Section 3 defines "labor dispute" as including "any controversy between an employer and two or more of his employees concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment."

A "labor dispute" is, therefore, an intangible clash of interests, and the statute's conception that it has a tangible existence at a physical "place" is a solecism without a clearly ascertainable meaning. For some purposes, as this Court has noted, an impasse reached between workers and employers, both located in San Francisco or Seattle, may create a labor dispute which exists "at" canneries in Alaska. *Unemployment Compensation Commission v. Aragon*, 329 U. S. 143.

Finally, the test of "nearness" without further particularization is too vague to satisfy due process. The concept of "nearness" is elastic; it is both subjective and relative, varying with the circumstances involved and the mode of passage contemplated. The same person who in one connection states that Bethesda, Maryland, is "far" from the Capitol may, in the next moment and wholly consistently, state in another connection that Germany is "near" England. In the first instance, he means that commuting daily by bus between Bethesda and work in Washington takes a relatively large part of the working day. In the second instance he means that one country's bombers may reach the other country's shores. What seems "far" by foot seems not so "far" by automobile, and positively "near" by plane. The statute here involved furnishes no standards or guides to the meaning of "near" as therein used, nor can any standard be reasonably derived by an analysis of its text or purpose. As appears

from the illustrations given, "nearness" is a description whose aptness relates to a method of transportation and the purpose for which the transportation is used. The statute contemplates neither such a method nor such a purpose, and accordingly not even an approximate standard or rationalization of the term is available. Is every point in North Little Rock "near" the place (whatever that is) of the dispute between the Southern Cotton Oil Company and its employees? What about points in Little Rock? Or in Hot Springs? What about points in Chicago, if the Company's products normally move to that area?

*Connally v. General Construction Co.*, 269 U. S. 385, is, we submit, controlling for the proposition that the test of "nearness" is here fatally vague. In that case the Court held invalid an Oklahoma statute prescribing as minimum wages the "current rate" in the "locality where the work is performed." The Court held, among other things, that the "locality" test was invalid for indefiniteness. It is apparent that this concept as used in the minimum-wage statute was much more susceptible to meaning than is "nearness" in the Arkansas statute here involved. Nevertheless, the Court stated (at 394, 395):

In the second place, additional obscurity is imparted to the statute by the use of the qualifying word "locality." Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the state supreme court on rehearing in *State v. Tibbetts*,—Okla. Crim. Rep.—, 205 Pac. 776, 779. But all the court did there was to define the word "locality" as meaning "place," "near the place," "vicinity," or "neighborhood." Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. The word "neighborhood" is quite as susceptible of variation as the word "locality." Both terms are elastic and, dependent upon circumstances, may be equally satisfied by

areas measured by rods or by miles. See *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284, 296, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; *Woods v. Cochrane*, 38 Iowa 484, 485; *State ex rel. Christie v. Meek*, 26 Wash. 405, 407, 408, 67 Pac. 76; *Millville Improv. Co. v. Pitman, G. & C. Gas Co.*, 75 N. J. L. 410, 412, 67 Atl. 1005; *Thomas v. Marshfield*, 10 Pick. 364, 367. The case last cited held that a grant of common to the inhabitants of a certain neighborhood was void because the term "neighborhood" was not sufficiently certain to identify the grantees. In other connections or under other conditions the term "locality" might be definite enough, but not so in a statute such as that under review imposing criminal penalties. Certainly the expression "near the place" leaves much to be desired in the way of a delimitation of boundaries, for it at once provokes the inquiry, "how near?" And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary—as in the present case it is alleged it does vary—among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.

**III. The Supreme Court of Arkansas violated the Fourteenth Amendment by affirming under a statute for violation of which the petitioners had not been charged.**

A comparison of Act 193 with the information (R. 1) under which the petitioners were convicted at trial demonstrates beyond dispute that the petitioners were charged and tried by the jury only for an offense created by section 2 of the Act—encouraging an unlawful assembly. The information makes no allegations which can conceivably charge a violation of section 1 of the Act. The gravamen of section 1 is the direct use, or attempted use, of violence or threats to prevent any person from engaging in any lawful vocation. The section contains no reference to any assemblage. The informa-

tion, on the other hand, refers to the petitioners only by alleging that they promoted, encouraged and aided an unlawful assemblage. The use of force and violence to prevent Otha Williams from working is alleged to have been committed by Walter Ted Campbell. There is no allegation that petitioners used force and violence against Otha Williams or anyone else. There is not even an allegation that the petitioners acted in concert with Campbell in promoting the assemblage or in any other way. The information alleges rather that Cole, Jones and Bean acted in concert "*with each other.*"

Nevertheless, the Supreme Court of Arkansas affirmed the convictions on the egregiously mistaken belief that Cole and Jones were accused of violating section 1 of the Act by using force and violence against Williams. That court stated (R. 107, emphasis added):

Information in the instant case, while charging that Cole, Bean and Jones violated the quoted provision of Sec. 2 of the Act, *also accused them of using force and violence to prevent Williams from working.* The use of force or violence, or threat of the use of force or violence, is made unlawful by Sec. 1.

... In view of the fact that *the judgments as to Cole and Jones are affirmed without invoking any part of Sec. 2 of the Act*, it is not necessary to discuss the construction appellants think the facts do not sustain.

It is beyond dispute, therefore, that the Supreme Court of Arkansas committed error and that it persisted in that error even after its attention was specifically directed thereto by the petition for rehearing (R. 108, 109). The only question which remains is whether the error is of a kind which gives this Court jurisdiction to reverse.

The error is plainly of such a character, since it results in denying the petitioners due process and the equal protection of laws, guaranteed by the Fourteenth Amendment.

"Conviction upon a charge not made would be sheer denial of due process." *DeJonge v. Oregon*, *supra*, at 362. See also *Albrecht v. U. S.*, 273 U. S. 1, 8; *Snyder v. Massachusetts*, 291 U. S. 97, 105; *Powell v. Alabama*, 287 U. S. 35, 68, 69; *Twining v. New Jersey*, 211 U. S. 78, 111. Add the appeal

proceeding is, for constitutional purposes, as much a part of the conviction as the trial judge's charge or the trial judgment. As stated in *Frank v. Mangum*, 237 U. S. 309, 327:

... it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the state of Georgia . . . provide for an appeal in criminal cases to the supreme court of that state upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases . . . it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment.

In the *Mangum* case, the Court also stated (at 331, 332) that its review to determine whether due process was accorded "must take into consideration the entire course of proceedings in the courts of the state, and not merely a single step in these proceedings." The Court, therefore, considered (see at 343, 344) whether the state appellate court's decision itself violated a provision of the federal Constitution.

Indeed, since the highest state court has construed the indictment as alleging the use by the petitioners of "force and violence to prevent Williams from working," this Court must review the conviction as having been rendered for that crime. Cf. *DeJonge v. Oregon*, *supra*; *Herndon v. Lowry*, *supra*.

The petitioners, therefore, were convicted by state action of using force and violence to prevent Williams from working. It is evident, however, that the information gave no fair notice that such a crime was charged. Hence the petitioners were convicted of a charge not made and thereby were denied due process.

What is more, the petitioners were lulled by state action into a failure to defend themselves from the charges on which they were eventually convicted. The information not only fails to charge petitioners with the use of violence against

Williams but actually ascribes that conduct to another individual, Campbell. The petitioners, moreover, had originally been indicted for violating section 1 of Act 193 by using force and violence against Williams (R. 6). Their conviction under this indictment was set aside by the Supreme Court of Arkansas itself. *Cole et al. v. State*, 196 S. W. (2d) 582. The opinion in that decision went on the basis that evidence had been erroneously admitted. An examination of the opinion makes it clear, however, that its statement of reasons was an inartistic description, and that the reversal was tantamount to a judgment that the evidence did not sustain the verdict. The evidence which the court held should have been "excluded" was all the evidence regarding the defendants' conduct, and the vice was not that any part of it was irrelevant and prejudicial, but rather that in its totality it failed to make out a case under section 1 of Act 193. The trial court's dismissal of the indictment under section 1 (R. 2) and the issuance of the information under section 2 were both recognitions of this circumstance.

Yet the appellate court, in a proceeding brought only under section 2, affirmed under section 1 convictions which, it had previously held, could not be sustained under section 1 on the identical evidence.

We submit that this remarkable course followed by the Supreme Court of Arkansas violates the Fourteenth Amendment. It offends "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses," and it "falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process." *Adamson v. California*, 332 U. S. —, 91 L. Ed. 1464, 1477 (Mr. Justice Frankfurter, concurring), 1506 (Mr. Justice Murphy, dissenting).

The state court's refusal to review the conviction under the statutory section under which it was actually obtained deprived the petitioners not only of due process but also of the equal protection of the state laws. A refusal to allow an appeal to some persons while permitting it to others convicted of the same offense violates this clause of the Fourteenth

Amendment. *Cf. Cochran v. Kansas*, 316 U. S. 255; *Hysler v. Florida*, 215 U. S. 420, 422, 423. By misconstruing the indictment, the Supreme Court of Arkansas in effect denied to petitioners an appellate review of the sufficiency of the evidence to support the verdict. Yet it gives such a review to others convicted under Act 193. *E. g., Smith et al. v. State*, 207 Ark. 104, 179 S. W. (2d) 195. It also denied to petitioners the right it accords others to appeal on grounds of the unconstitutionality of the statute under which they were convicted. It also deprived them of the right to have the jury pass on the facts, since the jury clearly never found that the defendants had used force and violence against Williams. Yet the right to trial by jury is accorded others by article II, section 10, of the state Constitution.

**IV. Act 193 violates the Fourteenth Amendment by making certain acts, which otherwise are misdemeanors, felonious merely because they are committed in aid of striking workmen.**

Under Arkansas law, a simple assault and battery is a misdemeanor punishable only by a fine not exceeding \$200. 1 Pope's Dig. Stats. Ark. (1937) secs. 2959 and 2923. Even an assault with a deadly weapon is only a misdemeanor, subject to a fine of \$50 to \$100 and imprisonment not exceeding one year. *Id.* sec. 2960. Assembling for the purpose of disturbing the public peace or committing any unlawful act is a misdemeanor, carrying a penalty of a fine of \$10 to \$100 and imprisonment of one to three months in the county jail. *Id.* sec. 3477.

If the very same acts proscribed by these statutes are committed in an excessively zealous attempt to assist the effectiveness of a strike, they become felonious under Act 193; subject to imprisonment in the state penitentiary for not less than one year nor more than two years. A thug hired as a strike-breaker who assaults a striker or contrives a disorderly assembly in order to make or induce strikers to return to work is, however, guilty only of a misdemeanor.

The distinction in treatment, here apparent, turns only on which side of the economic controversy is sponsored by the

offender. If he is promoting an employer's interest, his conduct is penalized less than if he is promoting employees' interests.

Accordingly, the only possible rationalization of this discrimination is that the weight of Arkansas state policy is on the side of employers in controversies with employees. And this orientation holds true regardless of the merits and ethics of the controversy and regardless of the public interests involved, whether the dispute was provoked by the employer, whether the employer brutally exploits his workmen, whether he uses force against them, and whether he violates federal and state law in his dealings with them. The statute is not merely an unperfected instrument to deal with violence arising from tumultuous labor relations. It requires little sophistication to recognize that Act 193 is not an anti-violence statute at all; it is an anti-labor statute. Neither Arkansas nor Texas, from whom Arkansas copied (Art. 1621b, Texas Penal Code, as amended by c. 100, Acts 1941), had any rational basis for an assumption that in labor disputes strikers pose a greater threat to the state's peace than do employers or non-strikers. The voluminous reports of the LaFollette Committee and the archives of the National Labor Relations Board indicate the contrary: And in any case, the statute has no machinery for accommodating itself to whatever may be the real threat to order in the situation created by a particular dispute.

The state has not here legislated a heavier penalty against violence in labor disputes than it provides against violence in other connections. Such legislation might be a reasonable classification and a valid exercise of the police power. Act 193, however, is simply a case of the state's supporting one side of the quarrel without reference to the merits.

When the Negro employees of the Southern Cotton Oil Company in North Little Rock assembled while on strike, they menaced not the peace of Arkansas but the policy expressed in Act 193 that workmen should not be able to unite effectively against exploitation. Act 193 was used here to hinder persons who already are in a depressed economic and racial status from effectively uniting to better their condition. The vagueness of the statute furthers the underlying anti-

labor policy by causing intimidation of the exercise of rights which, under a clearer statute, would be seen to be unimpaired.

The application of the policy which underlies Act 193 is, we submit, a deprivation of due process and the equal protection of the laws.

If the Act is simply directed against industrial violence, then the classification it accomplishes of strikers on the one hand and employers and non-strikers on the other, bears no reasonable relation to the asserted legislative objective, and hence violates the equal protection of laws clause. *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 429; *Gulf, C. & S. R. Co. v. Ellis*, 165 U. S. 150, 160, 161; *Skinner v. Oklahoma*, 316 U. S. 535. But if the objective of the Act is to throw the weight of the state against labor, without reference to any public interest, then it is an oppressive and discriminatory exercise of power which violates both due process and the equal protection of laws. The Act, in that case, can be sustained only if the following proposition is valid: the handicapping of labor is *per se* a legitimate objective for the exercise of state authority. Such a concept of government's functions is alien to our constitutional traditions.

### CONCLUSION

The judgment below should be reversed, with directions that the information be dismissed.

Respectfully submitted;

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**APPENDIX****Act 193, Acts of Arkansas 1943**

Section 1. It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 2. It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a "labor dispute" exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 3. The term "labor dispute" as used in this Act shall include any controversy between an employer and two (2) or more of his employees concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment.

Section 4. The provisions of this Act shall be cumulative of all other existing articles of the Penal Code upon the same subject, and in the event of a conflict between existing articles and the provisions of this Act, then and in that event the provisions, offenses and punishments set forth herein shall prevail over such existing articles.

Section 5. If any section, paragraph, clause, or provision of this Act is declared unconstitutional, inoperative or invalid by any court of competent jurisdiction, the same shall not affect or invalidate the remainder of this Act.